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1 Hearing Re: No Stay Pleading

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3 Hearing Re: Motion to Strike Certain Documents Contained in
4 Appellants' Designation of Items to be Included in the Record
5 on Appeal

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25 Transcribed by: Theresa Pullan

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1 P R O C E E D I N G S

2 THE COURT: I want to get appearances, and then I
3 have some comments.

4 MR. BABCOCK: Good morning, Your Honor, Russell
5 Babcock, I'm here on behalf of the estate of Kathleen Pillars.

6 THE COURT: Mr. Babcock that is.

7 MR. BABCOCK: Yes.

8 THE COURT: Okay. I thought I saw a different name
9 on the papers, Mr. Babcock.

10 MR. BABCOCK: Yes, Mr. Markell is a lawyer, while he
11 is a partner of the firm I am employed with, I filed an
12 appearance too so I could argue the motion today.

13 THE COURT: Okay, sure. Mr. Steinberg.

14 MR. STEINBERG: On behalf of the New General Motors,
15 and I'm with Mr. Davidson.

16 THE COURT: Okay. Folks, you don't need me to tell
17 you about the similarities between this case and Deutsch. But
18 there is a twist in it that I need you to address which neither
19 of you dealt with as directly as I would have liked in the
20 papers.

21 Mr. Babcock, Mr. Mastramarcos's brief recognized my
22 earlier ruling in Deutsch which is quite obviously directly on
23 point. And he tried to get around that, not by saying that
24 Deutsch was improperly decided, but relied on a different kind
25 of argument, although he didn't use what I would have thought

1 would be the right words to describe it.

2 The premise was that because whoever had filed the
3 removal petition in the answer in the State Court action which
4 I think was Michigan, certainly wasn't in this district, had
5 relied on the earlier version of the sale agreement. We had
6 apparently said execution copy, but was amended by our first
7 amended filed on June 30th, 2009, that this might be an
8 occurrence even though I had moved in Deutsch that the death of
9 a victim after a car wreck wasn't either an accident or an
10 incident. But you didn't flesh out the law of, didn't mention
11 the key words, judicial estoppel, trying to rely on some kind
12 of admission.

13 And it seems to me in essence what you and Mr.
14 Mastramarco are asking me to do is to rely on a wrong version
15 of the sale agreement. I got a couple of problems with that:
16 a) I didn't know how a guy in my position could responsibly
17 rely on what he knows to be the wrong agreement, and as a
18 matter of Second Circuit law, thought it's not unique to the
19 Second Circuit because the Supreme Court has said it as well.
20 To make out judicial estoppel, you need to have a couple of
21 things: one is materially different statements, and second,
22 reliance by the tribunal on the statement by the opponent.

23 New GM used the wrong language as far as I can tell.
24 I will allow Mr. Steinberg to be heard if he wants to correct
25 me on that, but it wasn't materially wrong at least at the

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1 time, and more importantly, there's no reliance by me on that,
2 and then third, of course, what the agreement says is the
3 evidence of what it says, not what a lawyer says about what the
4 agreement says. So I need help from you on that.

5 Conversely, Mr. Steinberg, I'll need some help from
6 you as to why either [indiscernible] there seemed to be
7 reliance on the old language rather than the new, and why the
8 issue that I just articulated wasn't raised. Once I rely on
9 the proper language in the agreement, and I got to tell you Mr.
10 Babcock that I think you'd have to throw a Hail Mary to
11 convince me that I should rely on the wrong language. So you
12 can tell me whether you think Deutsch was wrongly decided, and
13 materially wrongly decided being mindful of what I said in
14 quite a number of published decisions, that the interest of
15 predictability in the Southern District of New York is of great
16 importance and that the absence of manifest error I follow the
17 decisions, I follow bankruptcy Judges in this district and of
18 course I follow my own.

19 So strictly speaking, it's your motion, Mr. Babcock,
20 so I'll hear from you first, and then Mr. Steinberg with the
21 usual reply.

22 MR. BABCOCK: Your Honor, Russell Babcock here on
23 behalf of the estate of Kathleen Pillars. I guess the problem
24 as we see it from the New GM's perspective is that parties can
25 and do quite often waive defenses or arguments that they may

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1 otherwise have. Why do I think that's important here? Your
2 Honor, there has been no evidence to suggest that this was an
3 error on the part of New GM. New GM like anyone can take on
4 whatever obligations they want to. If they want to rely on
5 different contractual language they can do so. And in fact,
6 that takes it outside the purview. We're not asking the Court
7 here to make any changes to its rulings as to these, as to the
8 subsequent agreements. We're saying that New General Motors
9 has made admissions, in fact they've even used the words
10 admissions in their complaint, and not just once, Your Honor,
11 in paragraph 17, but I mean paragraphs 22, 27, 29, 31 through
12 34, 36, 37, 39 through 44, 46 and onward. There's at least 40
13 times where they make the same admission or incorporate the
14 same admission I should say.

15 And for them to come in here, and this case as Your
16 Honor pointed out was an Eastern District of Michigan under
17 Sixth Circuit rules courts, parties are bound by the statements
18 of their attorneys and especially in the context of pleadings.
19 As Your Honor is well aware of Federal Rules of Civil
20 Procedure, when you answer a complaint you either make a denial
21 or an admission. In this case they made an admission, and not
22 only that but they made it in the notice as well. There's been
23 no authority cited by New GM which disputes what I've just
24 said. They say we didn't really mean it. That's not
25 authority, that's an unsupported assertion.

1 And then, Your Honor, I guess with regards to the,
2 and I guess I want to make sure we flush out the Deutsch
3 opinion. There is a couple of key language that appeared in
4 the subsequent version that I think is important, besides the
5 fact that it did not have or other distinct and discrete
6 occurrences which the court noted in its opinion. Also in the
7 version that New GM is not relying upon in this particular
8 context, in this particular case, it doesn't have the first
9 occurring language which also the Court found important in the
10 Deutsch opinion as well.

11 THE COURT: Doesn't first occurring appear in both
12 versions?

13 MR. BABCOCK: Not in the excerpt that they've, well
14 see they did quote the language they're relying on in their
15 answer. And in fact if you look at paragraph, page 4 to
16 exhibit 2 to their notice of removal, they quote the language
17 that they're standing --

18 THE COURT: My bundle doesn't include that document.
19 Can you hand up what you're making reference to after showing
20 it to Mr. Steinberg?

21 MR. BABCOCK: Sure, I can hand you this document,
22 Your Honor.

23 THE COURT: And this is from the removal petition?

24 MR. BABCOCK: Yeah, it's from the removal. May I
25 approach the bench, Your Honor?

1 THE COURT: Yes sir.

2 MR. BABCOCK: Okay. That language is from the page 4
3 of the notice of removal. And as Your Honor can see, the
4 language that they're representing to the District Court of the
5 Eastern District of Michigan is this is what controls the
6 situation from our perspective. And --

7 THE COURT: Give me a second to reach it. Was
8 withdrawn by a Thomas P. Branigan of Bowman and Brook in
9 Bloomfield Hills, Michigan, attorney for New GM.

10 MR. BABCOCK: And I believe Your Honor --

11 THE COURT: Do you need this back?

12 MR. BABCOCK: I was going to reference it, Your
13 Honor. I can get -- all right. And again, Your Honor, if you
14 don't have, I apologize if you didn't get these documents, Your
15 Honor. And again, Your Honor, in paragraph 17 to the answer to
16 our amended complaint, now, that was marked I believe -- hold
17 one second here -- as exhibit 4 to our pleading, I don't know
18 if Your Honor has that as well. It says here, and I think it's
19 the same language. It says: all liabilities to third parties
20 for death, personal injury or other injury to persons or damage
21 to property caused by motor vehicles designed for operation on
22 public roadways or by the component parts of such motor
23 vehicles and, in each case, manufactured, sold, or delivered by
24 sellers (collectively) "product liabilities" which arise
25 directly out of accidents, incidents -- excuse me -- accidents,

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1 incidents or other and discrete occurrences that happened or
2 after the closing date, July 10, 2009 and arise from such --

3 THE COURT: What are you reading from, Mr. Babcock?

4 MR. BABCOCK: I'm reading from, this is the quote
5 from paragraph 17 to New GM's answer to the amended complaint.
6 And again, and arise from such motor vehicles' operation or
7 performance. That's the language, Your Honor, that New GM
8 represented to the District Court for the Eastern District, not
9 once but on two separate occasions, two separate pleadings.

10 And when Your Honor considers the fact that they
11 acknowledge in paragraph 17 that this is what they state, GM
12 LLC admits it ultimately did assume certain liabilities,
13 including the following as provided in section 2.3 (a)(ix) of
14 sale agreement. That's where the quote that I just read you
15 comes from. That's what they're relying upon, and that was
16 from attorney Tomas Branigan from Bowman and Brook LLP on
17 behalf of New General Motors.

18 So, Your Honor, the reason we're here, and this is
19 kind of, I mean I'm not aware of any other case where New GM
20 decided to take this approach. This is a situation where in
21 the context of this case, New General Motors made a decision to
22 take a certain position, and as we've pointed out in responding
23 to that position, the language that they're relying upon
24 provides broader liability and explore to New GM in the case
25 which covers, in the case of my client's claim at least than

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1 what may or may not have been accomplished in subsequent
2 agreements, but they're not relying on the subsequent
3 agreements in the case before the United States District Court
4 Eastern District of Michigan which is where this case was
5 removed by New GM.

6 So, Your Honor, we cited Sixth Circuit cases that
7 would explain why the Court in that case in that venue would,
8 why those statements are dispositive to New GM. There's been
9 no authority cited to the contrary. And then in --

10 THE COURT: Do I have the Sixth Circuit rule that
11 you're relying on in the record?

12 MR. BABCOCK: Basically the Federal Rule of Civil
13 Procedure Rule of pleading plus the two cases I was talking
14 about, the two cases talking, which are Barnes and the McDonald
15 opinions which appear in that no state pleading, and we cite to
16 them. On page 4 of our brief, Barnes vs. Owens Corning Fiber
17 Glass Corporation which is 201 F.3d 815 and page 829 is
18 referenced specifically as the Sixth Circuit 2000 opinion.
19 There's another one, McDonald vs. General Motors Corporation,
20 110 F.3d 337, 340 Sixth Circuit 1997. Again talking about the
21 impact of admissions made by attorneys or defendants of parties
22 in the course of litigation.

23 And again, Your Honor there's been no authority cited
24 by New GM that disputes that. They say we don't really mean
25 it. I take it as simply being buyer's remorse on their part

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1 now that they, that the consequences of their position has
2 become apparent now more willing to consider the impact to
3 there is any form their opinion with regard to this Court's
4 ruling rather than their own admissions earlier on.

5 THE COURT: Mr. Babcock, did the Pillars family file
6 a claim against Old GM where its trust, back in the time when
7 claims could still be filed?

8 MR. BABCOCK: Your Honor, that's the tragedy of the
9 situation. My client was in an automobile, the estate, the
10 decedent was in an automobile accident in 2005. She was in a,
11 she was incapacitated until her death in 2000, I believe it was
12 in 2012, Your Honor. And an estate was formed back in 2014.

13 THE COURT: Was there any kind of guardian or
14 anything appointed for her in the time between the wreck and
15 the time of her passing?

16 MR. BABCOCK: Not to my knowledge, Your Honor. In
17 fact, the appointment took place in 2014. She had a, she had
18 a, she was married at the time of the accident, and she was
19 being taken care for in basically a vegetative state from my
20 understanding at least up to the point of her death. And so
21 that's what, and so that's what I think is the most, the tragic
22 part about all this. New GM wants to be excused for its
23 conduct and its statements and its actions it's made in front
24 of Federal District Court in Michigan. But yet they want to
25 penalize my client for something that they did when they did

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1 nothing wrong. They were accused of, the decedent was a victim
2 of a car accident. Her wrongful death did not occur until
3 2012. A wrongful death statute claim could not have been
4 brought until her death, it goes without saying, and thus New
5 GM is saying sorry, you're out of luck. And but yet they want
6 this Court, to come in here and say on the other hand what we
7 say and what we do doesn't matter. And that is where, that's
8 where -- again, this is not going to have any impact on the
9 ruling from this Court today on this issue that we're bringing
10 to the Court's attention, will have no impact on the bankruptcy
11 estate. In fact, quite the contrary, New GM's agreed to take
12 on the additional liability which might otherwise went to the
13 old bankruptcy.

14 THE COURT: Well you're not pressing that
15 jurisdictional argument that I rejected I don't know how many
16 times in the cases that that lawyer Gary Peller brought.
17 You're simply saying that letting your client bring a wrongful
18 death case against New GM isn't that big a deal?

19 MR. BABCOCK: Because this is just one case, Your
20 Honor. This is, the admissions that they made in this
21 particular case, the position that they took in this particular
22 case involves only this particular case. It does not involve
23 or require this Court to make any adjustments to any of its
24 earlier rulings because --

25 THE COURT: I understand.

1 MR. BABCOCK: Yeah, so that's kind of where we're
2 coming from, Your Honor. And again I think it's also
3 important, that the defendant, that New GM I should say doesn't
4 provide any explanation as to this additional changed language,
5 the occurrence language that we already quoted. The fact that
6 there is no first occurrence language in the portion that
7 they're relying upon, the United States District Court Eastern
8 District of Michigan, none of that is being challenged. They
9 haven't said that we're not correct on our interpretation of
10 that occurrence and or the fact that it says or other distinct
11 occurrences. They don't challenge any of that, Your Honor.
12 They just say, well Your Honor made the rulings. Well Your
13 Honor did make the rulings, and as you pointed out in the
14 Deutsch opinion, you were, the issue in that case was whether
15 or not accidents and incidences were, you had to deal with
16 those particular terms.

17 And yet as you point out in your opinion that this
18 occurrence issue wasn't even a part of it, so there was no
19 reason to get into it. And as you pointed out in that case, no
20 one bothered even to discuss it. And in this case we are
21 discussing it. We've provided evidence, we provided definition
22 term, definition for this, for this terminology. I think that,
23 and the fact that the other additional language as we point out
24 further supports the fact that what we have here is a much
25 broader language.

1 So I guess with regards to this issue about the
2 Deutsch opinion, I guess as a representative of a victim of
3 these accidents, I would take the position even though I don't
4 think that the Court needs to get to this point because I don't
5 think you need to reverse yourself and Deutsch at all or even
6 clarify it to give us the relief we're asking for today. But
7 if push comes to shove, I guess and for the purpose of
8 preserving it for the record, I guess in addition to the
9 arguments made by the lawyers for that, for the estate in that
10 case, I guess the way I read the terminology with all due
11 respect to the Court is that you basically came down to
12 accident or incident meaning at least in my opinion and how I
13 took it, and maybe I'm wrong about this, is being the same
14 thing. But I think that we don't need to go there. I think
15 that the Court can grant the relief that we've already asked
16 for to the mechanism I've already explained.

17 Unless Your Honor has any questions, and I guess,
18 they have brought up these other issues about, and I just got
19 these, I got these when I came back from vacation yesterday,
20 about the responses to the [indiscernible] and the objection
21 where they make the additional argument about the, whether this
22 is, whether this is an ignition system. I guess we look at
23 paragraph 4 to their answer to the complaint, they kind of tie
24 it all together, they say this is all, ours is the same as
25 everyone else's as far as the recall problem. And so I guess,

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1 I don't think we need to go there because if you grant the
2 relief we asked for at the very beginning, all this additional
3 stuff becomes academic.

4 THE COURT: You're saying if I grant the relief you
5 still got to prove your case in Michigan State Court or
6 Michigan Federal Court?

7 MR. BABCOCK: Sure. Of course we would have to, we
8 would have to prove the underlying case against New GM, the
9 claims itself, yes. Unless Your Honor has any questions.

10 THE COURT: No, thank you. I want to hear from Mr.
11 Steinberg.

12 MR. STEINBERG: Your Honor, I think the most
13 fundamental point to start is that this lawsuit was improperly
14 brought. It was in violation of Your Honor's sale order and
15 injunction, and that it was a violation of the injunction to
16 start. That actually is the starting point. Under the Seletex
17 (phonetic) decision which we've cited to, Your Honor, many
18 times that if there was any confusion, they were required to
19 come in. Your Honor's Deutsch decision had been decided over
20 three years ago, and they brought this lawsuit anyway. And
21 they're arguing that some local counsel for New GM in the
22 context of trying to get this to the JPML for purpose of then
23 moving it to the MDL cited to the wrong version of the sale
24 agreement.

25 THE COURT: He was a lawyer for New GM, wasn't he?

1 MR. STEINBERG: Yes he was.

2 THE COURT: And I don't know if it matters because
3 over 45 years I've learned a little bit about the agency, but
4 isn't there somebody at the national level that supervises
5 local counsel?

6 MR. STEINBERG: I'm sure that in the context of this
7 wave of lawsuits there was more than the local counsel just
8 doing this. I think, Your Honor, that this was a mistake that
9 was made.

10 THE COURT: It plainly was. And the consequence is,
11 the question is who should bear the consequences of that
12 mistake?

13 MR. STEINBERG: But I don't think there's any
14 reliance on anything here. First you start with an improperly
15 brought --

16 THE COURT: Well that was the way I started, Mr.
17 Steinberg, because more likely if not plainly we don't have a
18 judicial estoppel, but Mr. Babcock makes a different point, he
19 asserts a judicial admission that's contrasted to a judicial
20 estoppel by reason of the fact that when people answer
21 complaints we hold people to what they say.

22 MR. STEINBERG: People amend their answers all the
23 time. And what was the admission that other than it was just a
24 mistake? Because at the end of the day if we had asserted the
25 old agreement and they had not refuted it, then are we all

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1 governed by the old agreement instead of what was the governing
2 agreement that applies to everybody in this case? The fact of
3 the matter is there's an underlying agreement that governed
4 this circumstance, the underlying agreement was the first
5 amendment. That first amendment --

6 THE COURT: I didn't see much reference to that in
7 your brief either, or attention to the distinction.

8 MR. STEINBERG: I think the, with regard to my brief
9 --

10 THE COURT: Unless I read the wrong brief.

11 MR. STEINBERG: No, no, I think we say that the fact
12 that there was a citation to the old amendment shouldn't change
13 what the controlling law is and I think we put that in a
14 sentence there.

15 THE COURT: In --

16 MR. STEINBERG: In our response.

17 THE COURT: 12 page response, it was pretty buried if
18 it was stated.

19 MR. STEINBERG: Yes. If you can bear with --

20 THE COURT: You mean [indiscernible] reliance on
21 subject matter jurisdiction and due process. Where is the
22 discussion of judicial or admissions or estoppels?

23 MR. STEINBERG: I think, well I think Your Honor on
24 page 7, footnote 5, New GM may have inadvertently referred to
25 the original language contained in section 2(b)(3)(b)(9) of the

1 sale agreement --

2 THE COURT: I see. All right.

3 MR. STEINBERG: -- and certain pleadings filed in the
4 underlying lawsuit, the language contained in the first
5 amendment with respect clearly governs this matter. Perhaps we
6 didn't give it the attention that Your Honor wanted us to give
7 the attention because we didn't think it mattered that much
8 because at the end of the day --

9 THE COURT: It matters critically, Mr. Steinberg.

10 MR. STEINBERG: Well, Your Honor, this issue actually
11 did come up in Deutsch. The first hearing that you had in
12 Deutsch, people had cited actually to the wrong amendment, you
13 actually had I think a second hearing on Deutsch where you
14 analyzed what would be the governing position, and you actually
15 in the Deutsch decision compared the language that was in the
16 June 26th, 2009 agreement versus the first amendment and said
17 no one has explained why the language changed, and therefore it
18 could have been because it was duplicative or otherwise, but
19 otherwise you were going to discount it. So this actual, you
20 know, this actual problem actually took place before in the
21 Deutsch case and Your Honor handled it that way by just looking
22 at the actual agreement. And maybe that's the reason why we
23 didn't give it as much attention in our brief that perhaps it
24 warranted.

25 But I go back and I also wanted to just address the

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1 issue that Your Honor said that you thought that we perhaps
2 miss-cited the section in our own brief. If you were referring
3 to page 2 of our brief, we were actually citing to the section
4 that was in the retain liabilities portion of the sale
5 agreement as compared to the assumed liabilities and that is
6 the right quote of how it was written in the retained
7 liabilities. So I think we got it right in our pleading.

8 But fundamentally what happened is that you had an
9 improperly started lawsuit in violation of Your Honor's sale
10 order. And we had deadlines in the state court because those
11 things go forward. We sent the no stay letter to them, and in
12 the meantime we had to try to remove this to the JPML and get
13 it ultimately before Judge Furman (phonetic) in the MDL, and
14 the statement that is being referred to here has no material
15 difference as to whether we cite it to the first amendment or
16 the second amendment, the June 26th agreement or the first
17 amendment, because the central focus was that it had bankruptcy
18 court jurisdiction and there was a basis for federal removal,
19 it relates to the bankruptcy case. New GM was disclaiming
20 liability and was saying that it should all be ultimately moved
21 to the MDL where it gets stayed because they're handling
22 [indiscernible] cases, and it's subject to Your Honor's order.
23 We waited then for them to file their response to the no stay
24 pleading and then Your Honor entered the judgment and that
25 created a separate procedure for the same thing.

1 Once in the, so the answer that was filed was the
2 answer that was filed in conjunction with something that was
3 ultimately going to be removed and stayed and ultimately the
4 answer should not have necessarily been required to be filed
5 because this action never should have been brought in the first
6 place. It was a violation of the Deutsch decision. There's
7 no, there's no judicial admission of anything because there was
8 no attempt to admit to an older agreement versus a new
9 agreement.

10 And if Your Honor needs a declaration from someone to
11 say that it was a mistake and answers could be amended all the
12 time, and so therefore I don't think in the very early stages
13 of an improperly led complaint you can say there's a judicial
14 admission of anything. This would have been amended if this
15 case would have gone forward, but this case never should have
16 been brought in the first place.

17 And I think the estate representative is the husband
18 who was taking care of the wife since the accident in 2005. So
19 Your Honor had this issue in Deutsch, unfortunately local
20 counsel made a mistake in responding where the goal was just to
21 get this to the MDL where it would be stayed while we
22 simultaneously would be dealing with this in the bankruptcy
23 court to say that it was subject to Your Honor's order.
24 There's no difference as to whether we cited the first
25 amendment or the June 26th amendment for purposes of the over-

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1 reaching point, that this was an improperly started lawsuit,
2 that this was, that there was federal jurisdiction based on the
3 bankruptcy court on this, and that this matter should be
4 ultimately removed to the federal court and then to the JPML.

5 Your Honor's decision in Deutsch also said that if
6 you even relied on the old amendment that it wasn't sure
7 whether there was any difference. And if you look at their
8 brief when they decide, when they're focusing on the word
9 occurrence --

10 THE COURT: I read Deutsch this morning again, I did
11 not see in there but you can refresh my recollection if I'm
12 mistaken any suggestion that if the words occurrence had
13 appeared and the words first occurring had not appeared, that I
14 had then ruled, assuming it wouldn't have been dictum, that the
15 conclusion would be the same.

16 MR. STEINBERG: I don't think you said that. I think
17 on page 5 of the Deutsch decision --

18 THE COURT: Give me a second please. Well I have it
19 in the Br. form, is it in the discussion or where?

20 MR. STEINBERG: It is in the discussion, it is after
21 the heavily blocked quote, and it starts with the paragraph,
22 but while incidents may be deemed to be somewhat ambiguous.

23 THE COURT: Right. I'm with you now. Basically I
24 said is I didn't have an evidentiary basis for concluding,
25 making conclusions as to the reasons for the change.

1 MR. STEINBERG: But the reason why this was even in
2 your decision was because there was the same mistake that was
3 made before, people were referring to the June 26th amendment
4 in an earlier hearing and Your Honor was struggling with would
5 it have made a difference, why was the change being made. If
6 people had cited to it properly the first time even in Deutsch,
7 you never would have had to deal with this discussion, because
8 the operative agreement is what controls. And that is really
9 you know we didn't say it in lots of words, sometimes you get
10 criticized for being verbose, here we basically said there is
11 one agreement, that is the agreement that is controlling, that
12 is what Your Honor has to apply in this case.

13 No matter what we said, we could say that the sky is
14 orange, but the sky is blue, that's what you have to recognize.
15 Here, there was no attempt to change a different agreement with
16 respect to a plaintiff who improperly started a lawsuit based
17 on an accident that took place ten years ago. The rest of the
18 arguments, I think, Your Honor, I think if, once you find that
19 there are prepetition non-ignition switch plaintiff, then the
20 rest flows from the judgment on the due process arguments and
21 the Court's jurisdiction argument. And so I think really we're
22 left to, and I think Your Honor has already said that you
23 believe that Deutsch is applicable or not for this particular
24 issue where a local counsel had improperly cited to a June
25 26th, but it wasn't to take any advantage, no court has ruled

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1 on this matter. The JPML hasn't even ruled on the removal
2 action.

3 And frankly again, and I'll conclude with this, and I
4 know I've said it a number of times, it all starts with the
5 fundamental notion that this was an improperly brought lawsuit.
6 And to say that someone in an answer said something on a
7 lawsuit that never should have been brought which was a
8 violation of an injunction I don't think they should be able to
9 bootstrap that type of argument. Thank you.

10 THE COURT: Mr. Babcock.

11 MR. BABCOCK: New GM filed a 58 page answer, a very
12 detailed, they went through quotes, it's a very detailed
13 answer. To suggest that what they say in this very detailed
14 answer should be disregarded by this Court flies in the face of
15 what the purpose of an answer is which is either make denials
16 or make admissions. They could have just said denied, isn't
17 true, denied, isn't true. But they instead they made the
18 decision to make admissions. They have not, as Your Honor, as
19 you pointed out when you, during opposing counsel's -- they
20 have not cited any authority that says they are excused from
21 the consequences of what they did, and I mean what the lawyers
22 in that case did.

23 Your Honor, unless Your Honor has any questions for
24 us, we'd --

25 THE COURT: Have everybody sit in place for a minute.

1 Gentleman, ladies and gentlemen, I'm ruling that the
2 Pillars action can proceed against the New GM and that New GM
3 will have the duty and of course the right to defend it on the
4 merits without expressing [indiscernible] merits in the filing
5 of my findings of fact conclusions of law and bases for the
6 exercise of my discretion in connection of this decision,
7 although I don't think I'm really relying on my discretion in
8 any way on this.

9 At the outset of oral argument I recognized as we all
10 had to recognize my Deutsch decision which if it had been
11 decided in a vacuum, this controversy had been decided in a
12 vacuum based upon the proper language of the sale agreement
13 would have resulted in a victory for New GM. But the fact that
14 had the potential ability to change the applicability of the
15 Deutsch decision was the language under which New GM's
16 assumption of its liabilities would rest.

17 In Deutsch, as we all know, the key language was
18 accidents or incidents first occurring. And the underlying
19 principal of that was that each word had to be given individual
20 meaning although they could overlap. It is not disputed that a
21 local counsel through GM said in two separate submissions,
22 first in a notice of removal and then also in an answer,
23 perhaps I'm flip-flopping their chronological order, but in two
24 separate documents, that New GM had assumed liabilities for
25 accidents, incidents or other occurrences, and did not rely on

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1 the words first occurring or mention the words first occurring.
2 As I discussed in the Deutsch opinion, first occurring had
3 significance as well. As I indicated at the outset of oral
4 argument, this is not a judicial estoppel, the requirements for
5 judicial estoppel of reliance by the tribunal is missing.
6 Nevertheless, as Mr. Babcock properly pointed out, it is a
7 judicial admission, which is similar in some respects, but
8 different in others. It is not for instance a statement in a
9 brief. It's a statement in the answer which has significance.
10 Answers have to be taken seriously. Although it is true that
11 answers can thereafter be amended, unless and until they have
12 been, they stand. Judges need to have the ability to rely on
13 answers because answers take issues off the table.

14 So then we get to the issue as to whether what GM's
15 counsel which is obviously an agent [indiscernible] should be
16 regarded because the litigation shouldn't have been brought in
17 the first place. Well, lots of litigations were brought in
18 what we now know to have been violation of my earlier order.
19 And when I had become aware of that, I have stopped them, I
20 have stopped them by stays. And it's for that reason that this
21 litigation is stayed. But it was one thing to say that this
22 action should be stayed, then later dismissed, and quite a
23 different way to say never mind [indiscernible] vis-à-vis
24 everything that happened in the first place.

25 I have not ruled to that affect in any of the 22

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1 decisions that previously issued in connection with the GM
2 case, and I am not of the mind to do that now. Obviously GM
3 has the ability to ensure that its counsel do their jobs and
4 it's not too much to hold GM for the consequences of what its
5 counsel who is plainly an agent did. So having admitted that
6 New GM is liable for accidents, incidents or other occurrences
7 I think have to parse those words. Under the principals of
8 Deutsch each word is to be given meaning. Accidents refers to
9 wrecks, we all know what an accident is. Incidents are,
10 applies to something that can include wrecks but can also
11 include other things. And as I ruled in Deutsch in of the
12 Pillars actions, repeating or characterizing my ruling in
13 Deutsch, that covers things like explosions, fires, car running
14 off the road and the like. Occurrences can overlap with that,
15 but it can also have some other meaning. And in this instance,
16 occurrences which as far as I'm aware has not and will not ever
17 be the subject of another judicial construction in this case.
18 But the principals of Deutsch should be construed as meaning
19 something else, and the arguments made by Pillars' counsel in
20 its brief that death from that is subject to coverage under
21 that ambiguity. Of course, the construction of documents when
22 they're ambiguous necessarily must go against the drafter.

23 So I'm going to allow this lawsuit to proceed, and
24 I'm going to state a couple of things for the avoidance of
25 doubt, although they should be obvious. One is I reiterate for

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1 the 900th time that I have subject matter jurisdiction over
2 this dispute. As is apparent from everything that I've said,
3 this applies only to this particular judicial admission in this
4 particular wrongful death case, and has no bearing on anything
5 that I ruled on April 15th or on the Cary Cutler (phonetic)
6 matters [indiscernible]. It does however, mean that New GM has
7 to defend this wrongful death case. And if it doesn't like
8 defending wrongful death cases when its local counsel admit
9 things that maybe they shouldn't have been admitted to, it
10 should supervise its counsel more carefully.

11 That summarizes my rulings. If New GM really wants
12 to appeal this, I reserve the right to issue a written opinion.
13 But as you all well know, I've got so many things beyond that
14 to deal with in GM and for that matter other cases on my watch,
15 that I'm not going to write on this unless I need to.

16 Mr. Babcock, you or your co-counsel can settle an
17 order in accordance with this ruling. Not by way of
18 rearguments, are there any questions?

19 MR. STEINBERG: Your Honor, will we have, can we have
20 the opportunity to make a submission, and I don't know whether
21 this is true or not, I would need to verify that at the time to
22 answer or amend, we had a right to amend the answer, that this
23 is not a judicial admission to give further briefing.

24 THE COURT: There was plenty of time to focus on
25 these issues before today. That's my ruling.

1 MR. STEINBERG: All right.

2 THE COURT: Mr. Steinberg, I have a zillion things on
3 my watch and I have to rely on lawyers dealing with issues in a
4 timely way. We can't have do-overs after I've ruled. I had
5 the same issue with a motion for rearguments now which is in
6 substance a do-over after I've ruled, I'm not going to invite
7 even more stuff of that character. Anything else?

8 MR. BABCOCK: Your Honor, I'm not familiar with how
9 the Court handles its orders.

10 THE COURT: Do you want to stand please? I take it
11 in most of the courts you would stand when you're talking to a
12 Judge?

13 MR. BABCOCK: I'm sorry, Your Honor, I wasn't being
14 disrespectful. Okay, at this point, the lawyers, would GM be
15 submitting a proposed order? Is that, do I understand what
16 your instruction was or do you want me to prepare an order?

17 THE COURT: I said you are to settle an order. We
18 have local court rules in this Court to deal with the
19 settlement of orders.

20 MR. BABCOCK: Okay, Your Honor.

21 THE COURT: Okay. Anything else? Have a good day.
22 We're adjourned.

23 MR. WEISFELNER: Your Honor, I apologize. This is a
24 procedural housekeeping issue. And let me see if I can't state
25 succinctly what the issue is.

1 As Your Honor knows, designated counsel on behalf of
2 plaintiffs filed what I'll refer to as an omnibus no strike
3 objection pleading, and also sought relief with respect to the
4 GUC Trust. And with regard to that omnibus pleading, we had
5 sought through a motion to have it, to have the reference
6 withdrawn. We are working with the GUC Trust and the GUC unit
7 holders on a potential resolution of issues that separate the
8 two of us, that being the plaintiffs on the one hand, the GUC
9 trust and unit holders on the other hand. And because we are
10 still working towards that resolution, the GUC Trust and the
11 unit holders have asked for the following form of relief that
12 we have no opposition to.

13 One is they want, they don't want to have to respond
14 to our motion to withdraw the reference, and have asked us to
15 modify that portion of our motion that would seek to have the
16 GUC Trust pleadings removed. And we are prepared to cede to
17 that request. We are likewise --

18 THE COURT: Pause please, Mr. Weisfelner.
19 Temporarily or the possibility that you won't have to revisit
20 the issue if the settlement goes through or for a longer
21 period?

22 MR. WEISFELNER: Your Honor, it would be our
23 intention to have our ability to withdraw the reference on the
24 GUC Trust pleadings spring back into effect if and only if
25 we're unable to reach a settlement between the parties. And

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1 otherwise, the settlement that we're working on would resolve
2 the issue once and for all. So I'll let the GUC Trust counsel
3 address it, but again what we're looking for is merely a
4 stipulation that this Court would approve that would extend the
5 time for the GUC Trust holders to respond to our motion to
6 withdraw the reference and on the merits with regard to the GUC
7 Trust. And on the merits with regard to the GUC Trust
8 pleadings, it would be our intention and we'll obviously
9 document all this in a proposed stipulation to present to the
10 Court, but since the deadlines are coming up so quickly, wanted
11 Your Honor to be generally aware of what's developing between
12 us and the GUC Trust.

13 THE COURT: Mr. Weisfelner, that's a common sense
14 approach variance of which of has been a zillion times in this
15 Court. I have only a technical question which is the one that
16 you may have thought about already which is that on a motion of
17 this character we have a shift over from my jurisdiction to
18 Jesse Furman's (phonetic) and the rules are pretty plain that
19 your first finding is done in this Court, which is I guess why
20 you came to me. But I would have thought that further findings
21 would be before Jesse Furman and in essence I'm tolling the
22 deadline before him. Do we need Jesse Furman's okay on this as
23 well?

24 MR. WEISFELNER: I think we do and it would be the
25 parties' intention to likewise present to Judge Furman a

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1 similar stipulation indicating that pending resolution or the
2 filing of an appropriate motion to approve a settlement between
3 the parties should we be able to reach one which I expect we'll
4 be able to do, that the time periods to respond to pleadings
5 either in this Court or before Judge Furman would be affected.

6 Now the reason for some of the confusion among the
7 parties is we not only have pending motions to withdraw the
8 reference, but only recently have had filed by New GM a motion
9 to compel us to withdraw our motions to withdraw the reference,
10 which have its own responsive and return dates. I think it's
11 August 12th. Your Honor may be asked to consider --

12 THE COURT: On August 12th in the New GM motion to
13 stop you from going to the District Court?

14 MR. WEISFELNER: Right. And frankly, Your Honor, I
15 should tell you and this will seem a lot like the old Atari
16 game of ping pong, my client's lead counsel in the MDL are
17 contemplating filing a motion to withdraw the reference on GM's
18 motion to compel us to withdraw our motion, to withdraw the
19 reference. So the ball has yet to stop bouncing, but ought to
20 shortly. All we're looking to accomplish today, Your Honor, is
21 to advise Your Honor that we intend that the GUC Trust not be
22 put to the test of filing a response to our motion to withdraw
23 the reference, and for that matter not be put to the test to
24 respond to our GUC Trust pleadings in a scenario where the
25 parties are in my view very close to resolving their issues,

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1 subject of course to the appropriate motion practice and an
2 opportunity for New GM to be heard.

3 THE COURT: Now here's what I'm going to do. I want
4 to hear first from the GUC Trust. Is it Mr. Martorana?

5 MR. MARTORANA: Yes, Your Honor.

6 THE COURT: Then from any unit holders who I see out
7 by first base if any of them want to be heard, and then from
8 Mr. Steinberg.

9 MR. MARTORANA: Good morning, Your Honor, Keith
10 Martorana of Gibson Dunn and Crutcher on behalf of the GUC
11 Trust. I believe that was an accurate recitation of where we
12 are. Just to clarify I think as a technical matter the way
13 that it will work is that there are two pleadings which the GUC
14 Trust right now without any changes would need to respond to.
15 One is the motion to withdraw the reference which as Your Honor
16 noted is before Judge Furman, our response is due on the 23rd
17 with respect to that. My understanding of what we --

18 THE COURT: That's in July Mr. Martorana?

19 MR. MARTORANA: July 23rd, correct. My understanding
20 of the discussions that we had with the plaintiffs is that they
21 would be modifying/withdrawing their aspect of the motion to
22 withdraw the reference solely with respect to the GUC Trust
23 asset pleading with a right to renew, obviously the withdraw
24 would be without prejudice. That would alleviate the burden of
25 the GUC Trust to have to respond to that pleading. And I

1 believe that technically that would be in a separate
2 stipulation dealing just with that issue that would be
3 presented to Judge Furman.

4 With respect to the underling GUC Trust asset
5 pleading, our response on a substantive level is due before
6 this Court on July 20th, assuming that issue was not withdrawn
7 to Judge Furman. With respect to that, the agreement there is
8 that we, that would be indefinitely adjourned with the right
9 for, if things do not go well on that settlement for the
10 plaintiffs to notify us, I believe on five business days'
11 notice that they want to, our response to be filed and to move
12 forward with the GUC Trust asset pleading. That's my
13 understanding of --

14 THE COURT: Only five days to respond?

15 MR. MARTORANA: Five business days.

16 THE COURT: Go on.

17 MR. MARTORANA: That's it. That's all I have, Your
18 Honor.

19 THE COURT: Okay. Unit holders?

20 MS. NEWMAN: [indiscernible]

21 THE COURT: Okay. Mr. Steinberg?

22 MR. STEINBERG: Your Honor, just so you know, I had
23 no notice of what was said to Your Honor just now for all this
24 time period. For whatever it's worth, the time period to
25 respond to the motions to withdraw the reference that have been

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1 filed by designated counsel have already been adjourned once
2 and the application to adjourn those matters were made to the
3 District Court. And the District Court approved those
4 extensions to take you to the July 23rd date. So Your Honor
5 was correct that they may ask you to do something but it's
6 really Judge Furman who has to do it because the matters are
7 before Judge Furman.

8 Yesterday I was contacted to schedule a meet and
9 confer to deal with a lot of these procedural issues that Mr.
10 Weisfelner decided to air to Your Honor now. That was
11 scheduled for tomorrow at noon, so the idea that we're having
12 this played out before there is even a meet and confer is an
13 unusual process. To the extent that Mr. Martorana said that
14 there is a pleading that is before Your Honor which is the
15 motion to the no strike pleading which they've also moved to
16 withdraw the reference, but the no strike pleading is
17 technically before you, then --

18 THE COURT: Which of the zillion no strike pleadings
19 are we now, that I have are we now talking about?

20 MR. STEINBERG: These are the, this is the designated
21 counsel's no strike pleading.

22 THE COURT: That was filed a long time ago.

23 MR. STEINBERG: That was filed about 15 days ago, 20
24 days ago, something like that.

25 THE COURT: The first of them, wasn't it?

1 MR. STEINBERG: Well I think they've only filed one,
2 designated counsel has filed one --

3 THE COURT: Now I was just putting all of the no
4 strike pleadings together in a single bucket.

5 MR. STEINBERG: But, Your Honor, with regard to that
6 pleading, if designated counsel wants to in effect not move
7 forward on that, then I believe then the designated counsel
8 should strike that from its pleading, otherwise, you're going
9 to get a circumstance where it's part of the resolution, we're
10 going to have a hearing ultimately before Your Honor, we'll
11 respond about some aspect of what is being said, GUC Trust will
12 not respond, and you'll have a messed up process. Either
13 they're going forward with it or they're not going forward with
14 it. If they're going to adjourn it then they should be
15 bifurcating it and pushing it out and not dealing with it at
16 all, but we shouldn't be in a position where we have to respond
17 to it, and the GUC Trust who is on the front lines of that
18 issue is not responding to it and we have no idea whether this
19 is going forward or not because of a potential deal that may or
20 may never occur.

21 THE COURT: Let me get any reply you have, Mr.
22 Weisfelner, and as part of that, tell me how long you think
23 you'll know whether or not you're going to have a deal with the
24 GUC Trust.

25 MR. WEISFELNER: Sure. Your Honor, let me try and

1 clarify because I don't want Your Honor to believe that we are
2 in any way mixing apples or oranges. There are basically two
3 separate issues that are contained within designated counsel's
4 no strike no stay pleading. On the one hand, we have the
5 question as to whether or not the second amended consolidated
6 complaint filed on or about June 12th with Judge Furman does or
7 does not contain allegations or contentions that Your Honor has
8 indicated in your decision are inappropriate because they
9 relate to Old GM. It's our position in the no strike no state
10 pleading that the second amended consolidated complaint seeks
11 to hold New GM and only New GM liable for its own independent
12 acts and conduct which we read as being permissible under Your
13 Honor's decision, and that the references to Old GM are there
14 for context only, and that we are not seeking to hold New GM
15 liable for Old GM's conduct. Let's put that aside because
16 nothing that I've said this morning affects the relief that we
17 seek in connection with the second amended consolidated
18 complaint.

19 The situation as it exists between the plaintiffs,
20 the GUC Trust and the GUC unit holders is as follows. Your
21 Honor indicated in your April decision that there was a lack of
22 appropriate due process notice and a resulting prejudice with
23 regard to the bar date. And in that context indicated that
24 late proofs of claim, applications to file late proofs of claim
25 were contemplated. Your Honor then went on to say --

1 THE COURT: Contemplated or were permissible under my
2 order?

3 MR. WEISFELNER: Well permissible. But Your Honor
4 then went on to say that under the doctrine of equitable
5 mootness there would be no recovery from --

6 THE COURT: I think what I said, the words were that
7 assets of the GUC Trust couldn't be tacked even for late
8 claims.

9 MR. WEISFELNER: Correct.

10 THE COURT: That was what Ms. Newman argued, or if
11 she argued it or not, that was what I ruled after she won on
12 the mootness issue.

13 MR. WEISFELNER: Understood. And, Your Honor, here
14 is the issue when all is said and done. And I recognize that
15 this issue depending on your perception may or may not have
16 been intended by Your Honor. But we can all read the language
17 of Your Honor's decision, and it is the subject of an appeal,
18 although we don't know to which court that appeal will go, but
19 it -- here's our concern. As Your Honor is aware, there is an
20 accordion feature in the plan, and what the accordion feature
21 basically says is as Your Honor well knows, if you get up to
22 \$35 billion worth of claims, and up to \$42 billion worth of
23 claims then New GM would be responsible for an additional
24 number of shares of New GM stock to be contributed to the
25 trust. I think the parties all recognize that under the

1 current state of affairs the GUC Trust will never trigger the
2 accordion feature. The most that the GUC Trust could have by
3 way of claims is something like \$33 billion worth of claims,
4 and 35 is the triggering number. The concept that's being
5 contemplated between the plaintiffs and the GUC Trust would be
6 a mechanism by which we would say, look, if we the plaintiffs
7 are in a position to trigger the accordion feature, then so
8 long as we have exclusive rights to the accordion value, we
9 will forever leave you guys alone with regard to all of the
10 value that was ever in the trust or that remains in the trust
11 for future distribution. So you take all of the value that was
12 there but for the accordion, we take the accordion value if we
13 are ultimately able to trigger it.

14 Now, Your Honor, and again, with all due respect to
15 Mr. Steinberg, he's right, we didn't tell him that procedurally
16 and it was really at the request of the GUC Trust who otherwise
17 has a brief due I think as early as the 20th, and we saw no
18 reason for them to spin their wheels and write another brief as
19 early as the 20th, which is why we came here today. And I did
20 let Mr. Steinberg know in conversations we had I think
21 yesterday what direction we were going in with regard to the
22 GUC Trust. So that's the whole controversy.

23 New GM takes the position that Your Honor's equitable
24 mootness decision in effect killed off the accordion feature,
25 that there is no more accordion feature, it doesn't exist,

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1 can't ever be triggered. We disagree. I think the GUC Trust
2 would likewise disagree. And all we're looking for is an
3 opportunity to resolve our controversies with the GUC Trust on
4 the basis that I just elaborated. If and only if we're able to
5 trigger the accordion feature, it's ours. You get to keep
6 everything else and will no longer contend that we're entitled
7 through a reversal of equitable mootness to start glomming on
8 to the about billion dollars you have left or for that matter
9 to seek to compel people to start giving stuff back, we'd be
10 done on that issue.

11 And, Your Honor, that's the reason that at this point
12 rather than spin wheels and have people drafting additional
13 briefs that as between us and the GUC Trust, we'd like to do
14 away with their need to file a brief. It doesn't therefore
15 give New GM the opportunity to say, oh, then by the way with
16 regard to your no strike pleading on whether or not the second
17 amended consolidated complaint does or does not violate Judge
18 Gerber's order. Well if you're going to kick over the issue
19 with the GUC Trust, we want you to kick over our issues too,
20 enough delay, we want resolution of these issues. As they
21 impact Judge Furman's ability to go forward with motion
22 practice, we need these matters resolved.

23 THE COURT: The second half of what you said raises
24 bigger issues than the first. By itself your request to give
25 the GUC Trust more time or to be more precise to get me to say

1 to Jesse Furman that Gerber doesn't care if you don't care is
2 benign, it's minimal. But what New GM might say in its
3 response to its papers could be affected by the terrain
4 depending on whether or not there's a deal between your
5 constituency and the GUC Trust to stick it to New GM. That
6 might not affect the merits, but it would be something that New
7 GM might want to be heard about if it perceives the issue to be
8 in those terms.

9 So the issue before me is that assuming arguendo that
10 I agree that I should tell or authorize you to tell Jesse
11 Furman that I'm not opposed to it if he's not, whether there
12 should additionally be a recommendation that if New GM thinks
13 it needs some time to deal with the facts on the ground whether
14 I should condition what I said on that. Do you want to be
15 heard on that one last time?

16 MR. WEISFELNER: Well sure. There will be no
17 substantive impact on anyone's rights other than the procedural
18 extension of time for people to file papers. That will be
19 accomplished without notice and an opportunity to be heard by
20 New GM. So for example, if we were, meaning us on the one
21 hand, GUC Trust unit holders on the other hand, able to
22 consummate a settlement, it would be brought to the Court's
23 attention under rule 9019 I presume, either to this Court or to
24 Judge Furman depending on the resolution of the motions to
25 withdraw the reference on notice to New GM. And New GM will

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1 have an opportunity to oppose that 9019, take the position that
2 as Your Honor indicated we've colluded in an effort to stick it
3 to New GM. And they'll be entitled to be heard on the merits
4 with regard to that contention, and the settlement will not be
5 effective unless and until the Court overrules that objection.

6 And --

7 THE COURT: The problem with that Mr. Weisfelner is
8 the different way which judges evaluate 9019s in part. The
9 principal attention that a judge gives to the 9019 is whether
10 the estate is giving away the store. And that would mean in
11 this context whether Mr. Martorana is prejudicing the interest
12 of the GUC Trust community and its unit holders, which if he
13 entered into the deal would be very hard to find because the
14 problem if there is a problem with any such deal is he's
15 helping his guys too much, not that he's helping them too
16 little. Sometimes in evaluating 9019s, we also look to see
17 whether parties while acting in the interest of the estate are
18 nevertheless inappropriately adversely affecting parties who
19 aren't at the table, that's the more significant concern here.

20 MR. WEISFELNER: Sure. And, Your Honor, again the
21 only party --

22 THE COURT: We have this in asbestos cases which you
23 have more than a little familiarity.

24 MR. WEISFELNER: And, Your Honor, again I see the
25 analogy and you're right I think the only party that could

1 stand up and say they're being adversely affected aside from
2 the plaintiffs which I want to get to in a minute to respond to
3 your question about how much time do I think this takes, the
4 only party that would be adversely affected would be New GM.
5 It's New GM's stock that would have to be forked over were the
6 accordion feature triggered. And I would assume that New GM
7 has an economic interest in not having the accordion trigger in
8 maintaining that the accordion feature is now dead as a
9 consequence of Your Honor's equitable mootness decision. And
10 obviously we're not going to get our hands on that stock
11 without New GM putting up a fight. And be it this Court or
12 Judge Furman, I presume, will give New GM all the time and due
13 process it needs and wants in order to ensure that its rights
14 are protected before it literally has to turn over 10 million
15 shares of New GM stock.

16 The issue on the plaintiff's side is quite a bit more
17 complicated. There are any number of potential subclasses of
18 plaintiffs that may want a shot at the accordion feature should
19 it ever be triggered. You have the easy subclass if one were
20 to think what are the classes, you have the ignition switch
21 defect plaintiffs as defined, that being the ones that were
22 subject of the first two recalls. You have the other ignition
23 switch defect plaintiffs that were the subject of the
24 subsequent recalls. You then have the non-ignition switch
25 defects.

1 THE COURT: What's your Weintraub [indiscernible]
2 because I would have thought that they should have, or could
3 make a decent argument that they should have first dibs on any
4 claims against the estate.

5 MR. WEISFELNER: Now Mr. Weintraub was careful I
6 think to represent only the presale accident victims who drove
7 ignition switch defect vehicles defined to be limited to the
8 first two recalls, the ones I think in February and March of
9 2014.

10 MR. STEINBERG: [indiscernible]

11 MR. WEISFELNER: That's my best recollection. He may
12 tell you otherwise, and we are working with Mr. Weintraub with
13 regard to this settlement that he represents pre-sale accident
14 victims that drove other vehicles. But my point is this, the
15 GUC Trust and unit holders want the broadest from of relief
16 possible. They want as many people to stand down from
17 challenging their exclusive rights to the cash that's gone out
18 the door and the billion or so dollars left to go out the door
19 based on the remaining securities that they've asked for and
20 Your Honor has given authority to liquidate but not distribute.
21 So they want all of us plaintiff types to say no mas, we're not
22 coming after you to ever dip into those assets.

23 We need to ensure that we're not prejudicing any
24 plaintiff rights with regard to the accordion feature should it
25 ever be triggered. And what we contemplate is a procedure that

1 has the late filed claims being authorized, some sort of
2 estimation procedure as to what the magnitude of damages would
3 be, either the accordion is triggered or it's not with New GM
4 participating in all of those proceedings. And then a
5 subsequent determination, we believe most efficiently by Judge
6 Furman as to what the relevant entitlements would be as among
7 those potential class plaintiffs to the rest that would be the
8 accordion feature.

9 And because we have issues like class notice for
10 settlement purposes under rule 32, all of those issue take
11 quite a while to resolve, that would be a to be determined
12 aspect of the overall settlement that would be relevant if and
13 only if the accordion ever does get triggered and in the
14 scenario where everybody, every party's rights gets protected.
15 So to put a practical spin on it, 10 million shares of GM
16 stock, call it at \$30 a share, I think it trades a little bit
17 higher than that today. We're talking about potentially I
18 think it's 30 million shares, we're talking about potentially
19 \$900 million of accordion feature value that would get put into
20 a lock box and distributed to whoever was entitled to a portion
21 of that lockbox value. And in exchange for the GUC Trust and
22 unit holders stepping out of the way for that to occur, would
23 leave them alone on the values they've already distributed and
24 the approximate billion dollars left that they'd like to
25 distribute as soon as they finish selling off all their

1 securities.

2 We fully recognize that we will have New GM to battle
3 with over these issues, and we fully understand that we'll have
4 to go through at a minimum class certification for settlement
5 purposes before resolution of the value in the accordion
6 feature as ultimately resolved. But all we're doing now
7 procedurally is taking the GUC Trust off the hook for filing
8 papers on the 20th and thought Your Honor ought to be made
9 aware of that before you started cataloguing all the documents
10 you get on the 20th and notice the absence of their response.

11 THE COURT: All right. Let me hear first from Mr.
12 Martorana and then I am going to give Mr. Steinberg a further
13 chance to be heard.

14 MR. MARTORANA: Again, Your Honor, Keith Martorana,
15 Gibson Dunn and Crutcher on behalf of the GUC Trust. First
16 off, I just want to say I think we're way ahead of ourselves
17 when we're talking about potential 9019 motions or anything of
18 that matter. The GUC Trust is a publicly traded trust, at this
19 point I don't want to take any position as to confidential
20 negotiations on a potential settlement. We're at very
21 preliminary stages and that's about all I'm prepared to say
22 about it. I understand what Mr. Weisfelner said about what his
23 view of where negotiations are. At this point, the GUC Trust
24 is not taking a position, I don't think we have to for purposes
25 of what we're talking about today. That's what I want to start

1 with.

2 Your Honor, with respect to what we're asking for
3 here, I think Mr. Weisfelner said it right, what we're looking
4 for is to avoid having, we are in potential, we are in
5 negotiations very preliminary, we're looking to avoid a
6 scenario where we have to file unnecessary papers. Your
7 judgments and order actually did the bifurcation here, there
8 is, there is no strike pleadings, there's GUC Trust asset
9 pleadings, which is all that we're talking about here, there's
10 no state pleadings, those issues are all bifurcated and for
11 good reason, they're unrelated to each other. There have been
12 a number of, the plaintiffs have filed no strike pleadings, no
13 state pleadings, [indiscernible] filed a no state pleading, but
14 didn't file a GUC Trust asset pleading, so for ease for
15 procedural ease, Mr. Weisfelner's client did an omnibus
16 pleading, and then they did an omnibus motion to withdraw the
17 reference. But there shouldn't be any reason why those can't
18 be taken separately, and Mr. Weisfelner should not be permitted
19 to withdraw his motion to withdraw the reference with respect
20 to the GUC Trust asset pleading, that shouldn't have any effect
21 on the no strike pleadings or the no state pleadings that New
22 GM has to deal with.

23 And for the same reasons, the substantive response to
24 a GUC Trust asset pleading which only deals with whether or not
25 non-ignition switch plaintiffs and non-ignition switch personal

1 injury plaintiffs are affected by Your Honor's judgments why
2 that should have any effect on New GM and pleadings that they
3 have to deal with. So I really do think we're mixing apples
4 and oranges here, I think they can be dealt with separately and
5 I just frankly don't understand the prejudice to New GM in that
6 respect.

7 THE COURT: Mr. Steinberg?

8 MR. STEINBERG: Your Honor, I think Mr. Weisfelner
9 made the analogy about the Atari and the ping pong, I'm sitting
10 there trying to figure out how a procedural request became a
11 substantive discussion of a preliminary of a settlement
12 discussion. But the reality is is that what Mr. Martorana just
13 said is exactly what I say -- if there's going to be argument
14 on the withdraw of a reference which is before Judge Furman we
15 need to know what the pleading is that is before Judge Furman.
16 If they want to withdraw their request vis-à-vis the GUC Trust
17 what Mr. Martorana called the GUC Trust pleading, they are free
18 to do that and we do not object to that, just they can withdraw
19 whatever they want. If in connection with the pleading that's
20 before Your Honor, if someone wants to say and I didn't
21 appreciate this deference, but there's such a thing called the
22 GUC Trust pleading versus a no strike pleading, and that they
23 want to in effect bifurcate so that there's no, nobody has to
24 respond to the GUC Trust pleading issues, and the only thing
25 that you're focusing on in connection within their no strike,

1 whatever omnibus pleading they filed, is the issue about
2 whether the New GM can argue that what they filed in the, on
3 the second amended complaint violated Your Honor's judgment
4 then focus on that aspect of it, then we can file our response
5 and do that as well too.

6 So Mr. Martorana says we're mixing apples and oranges
7 because he's essentially arguing a bifurcation which he says
8 exists based on the names of the pleadings, and if that's the
9 case then that's fine. And I don't care, I just don't want to
10 be in a position where I have to file a pleading on the 20th
11 which we're prepared to do.

12 And for Your Honor with regard to the second amended
13 complaint and I don't know whether the GUC Trust aspect is part
14 of the thing that I have to respond to or not, as of this
15 moment I still think I have to, if they are bifurcating it, if
16 they are excluding it for me as well as them I don't have to
17 consider it, either they withdraw it or bifurcate it, then
18 that's okay.

19 THE COURT: All right. Folks, it seems to me that
20 although I would have been offended if requests had been made
21 of this character to Judge Furman without bringing it to my
22 attention first, ultimately the decision is properly to be made
23 by Judge Furman. To the extent that the GUC Trust and the
24 plaintiffs are asking me to say to Judge Furman that to the
25 extent if any to which I have the right to be heard on this,

1 I'm authorizing you to say that if it's okay with him it's okay
2 with me. The second and more important issue is how any
3 standstill between the plaintiffs on the one hand and the GUC
4 Trust on the other or any deal that might thereafter be made
5 could adversely affect New GM presents a slightly harder issue
6 or perhaps a materially harder issue. But it is again one in
7 which I think I can and should cede whatever residual
8 jurisdiction I have over that over to Judge Furman, although
9 frankly I think it's solely a Judge Furman issue. He may
10 conclude that he needs to know with greater clarity what the
11 GUC Trust and the plaintiffs propose to agree on matters that
12 might affect New GM or he might conclude what is before him
13 doesn't require him to know that. That's a decision that is
14 appropriately to be decided by him without me stepping on his
15 toes.

16 Related to that is a first cousin of that which is
17 whether New GM would be impaired in its ability to address
18 these matters by not knowing yet what the deal might be with
19 respect to the plaintiffs on the one hand and the GUC Trust on
20 the other or a variant of that knowing a broad outline what the
21 concept might be, but where the devil might be in the details.
22 Ultimately by reason of the withdraw of the reference structure
23 which requires that motions for withdraw of the reference be
24 filed in the first instance by the Bankruptcy Court when then
25 calls on District Judges to make the decisions. And by reason

1 of that provisions in I think it's rule 9055 that says that on
2 motions to withdraw the reference proceedings in the court
3 below which is of course the Bankruptcy Court are not stayed in
4 the absence of the contrary order. And I'm not of a mind at
5 this point if ever to issue a contrary order on matters that
6 are before Jesse Furman as a matter of judicial courtesy, and a
7 comity with a T, tango. I think I should let Jesse Furman deal
8 with that issue as well, what I'll call the fairness issue to
9 New GM, assuming arguendo that I have the ability to tell Jesse
10 Furman what to do in that regard. To the extent I have that
11 power, I decline to exercise it.

12 So the bottom line is that I'm in substance allowing
13 you all to say that if it's okay with Jesse Furman, it's okay
14 with me. I assume he will consider issues of fairness to New
15 GM in terms of when New GM's response should be done if it
16 can't be consensually addressed, and if he thinks an adjustment
17 should be made that of course is also fine with me.
18 Conversely, if he decides that the existing schedule is
19 sufficient, that is also fine with me.

20 I gather from what Mr. Weisfelner said that I will
21 have at least initially before me not just New GM's motion to
22 block the plaintiffs from trying to withdraw the reference, but
23 some motion of some type to the plaintiffs to block New GM's
24 attempt to block that. And I gather from the way both you guys
25 are talking that there's no consensual resolution of that

1 standoff in sight. And I'll decide after all the papers are in
2 what I should be doing in that connection. But I'm expressing
3 no view on that now.

4 What else Mr. Steinberg?

5 MR. STEINBERG: Your Honor, I --

6 THE COURT: Come to the main mike if you please.

7 MR. STEINBERG: I understood your ruling about
8 deferring to Judge Furman with regard to the motions to
9 withdraw the reference. But there are, and I just want to make
10 sure I understood the ruling, there are the no strike pleadings
11 that are before Your Honor, and I thought the request that was
12 being made was something to do with adjourning the GUC Trust
13 response to respond to that. And I wasn't sure how Judge
14 Furman would deal with something that's before Your Honor on
15 the no strike pleading.

16 THE COURT: Then we have a misunderstanding because I
17 thought I was only talking about the plaintiff's motion to
18 withdraw the reference. If there are no strike motions that
19 are before me that are not the subject of a motion to withdraw
20 the reference, I think under 9055 I've got to deal with them.

21 MR. STEINBERG: Your Honor, just to clarify, the no
22 strike pleading is before Your Honor. The motion to withdraw
23 the reference with regard to the no strike pleading is before
24 Judge Furman. The request that Mr. Weisfelner was making was
25 to ask you to adjourn to allow the GUC Trust ability to respond

1 to the motion to withdraw the reference which is before Judge
2 Furman to be adjourned. I understood you saying that that's a
3 Judge Furman call, but under rule 9055, that is the rule, the
4 no strike pleading because the motion hasn't been withdrawn is
5 before Your Honor. And there's a time for both New GM and the
6 GUC trust to respond to that no strike pleading which is I
7 think July 20th. They were asking you to allow the adjournment
8 of that pleading in a, which is before Your Honor at that point
9 in time because there is no stay caused by the motion to
10 withdraw the reference.

11 THE COURT: Then I'm confused because what we were
12 talking about is something that required the GUC trust to
13 respond to Judge Furman. Are we talking about a response that
14 GUC trust also has to make before me?

15 MR. STEINBERG: Without, I will say yes, but I will
16 ask him to confirm that, I think it is, yes. There are two
17 different deadlines, the motion to withdraw the reference
18 deadline, the extension is now through July 23rd, that's a
19 Judge Furman District Court issue, and then in the Bankruptcy
20 Court, the no strike pleading, the deadline is July 20th, and
21 that's a bankruptcy --

22 UNIDENTIFIED: [indiscernible]

23 MR. STEINBERG: 20th, and that's a Bankruptcy Court
24 issue. So I think I understood, I understood deferring to
25 Judge Furman on something that is before him but I don't, I

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1 wasn't sure whether you were actually saying that he should
2 decide the pleading of the time limit to, that is before you at
3 this point in time.

4 THE COURT: I didn't understand myself to be saying
5 that because I was not then sensitive to the fact there were
6 two separate deadlines imposed upon the GUC Trust. I think I
7 need a little more discussion on this, but I want you to talk
8 about the tentative which would be to toll the GUC Trust time
9 for both until Jesse Furman has decided what he wants to do on
10 the motion to withdraw the reference without prejudice to my
11 ability to decide what I need to do on mine after he's had a
12 chance to think about it in terms of what goes on in his court.
13 I don't want to step on his toes by issuing a substantive
14 ruling on something that is primarily before him in the first
15 instance.

16 MR. STEINBERG: Right. And I think what I was saying
17 in my prior presentation to Your Honor which is that if what's
18 before you now with regard to the GUC Trust is withdrawn then I
19 have no issue with that. If they want to give them an
20 adjournment then I think they really have to bifurcate the
21 issue because I don't want to be responding to that GUC Trust
22 issue while they're not responding to that issue, and Your
23 Honor won't have a complete record when this thing is argued.

24 THE COURT: My tentative, and I'm going to give both
25 Mr. Weisfelner and Mr. Martorana a chance to comment on this

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1 part as well, would be that anything that is before me that
2 while I toll it for the GUC Trust, I would also toll it for New
3 GM. And then that's without prejudice to anybody's rights to
4 come back after Jesse Furman has expressed any views to tell me
5 that I should change that approach. Mr. Weisfelner?

6 MR. WEISFELNER: Your Honor, I apologize both to the
7 Court and to Mr. Steinberg, I think I haven't made myself
8 clear. With regard to the motion that's pending currently
9 before Your Honor but is subject to a motion to withdraw, that
10 being the plaintiff's no strike no stay GUC Trust pleading
11 which was filed in an omnibus, we can without judicial
12 intervention I would respectfully suggest cause the GUC Trust
13 not to have to file any pleadings if we withdraw that portion
14 of our omnibus motion without prejudice that relates to the GUC
15 Trust assets. That would result in no party having to address
16 the GUC Trust pleadings on the merits.

17 THE COURT: I know I'm interrupting, and that would
18 be a one sentence, a one page piece of paper?

19 MR. WEISFELNER: Yes, Your Honor.

20 THE COURT: Keep going.

21 MR. WEISFELNER: Now, frankly the reason why we
22 didn't lead off with that is and one of the reasons I wanted a
23 meet a confer tomorrow where it's not just me but I actually
24 have my lead counsel involved and I understood Mr. Steinberg
25 wouldn't get Kirkland and Ellis involved. We're sort of mixed

1 up in a scenario where and again I don't want to prejudice the
2 record any further than we've already elaborated on it, but New
3 GM takes the position that there is no accordion fees, so we
4 can bang our heads against the wall unless and until Your
5 Honor's decision with regard to equitable mootness is reversed,
6 you can never have an accordion feature to trigger. What I'm
7 concerned about is to the extent that I withdraw my GUC Trust
8 pleading, which Your Honor laid out as one of the mechanics in
9 your June 1st order, I got to make sure that I'm not prejudice
10 down the road with regard to our appellate rights. Assuming we
11 can overcome that hurdle which I think we can do by consent,
12 then among what we would do is, we would withdraw that portion
13 of our omnibus pleadings that relate to the GUC Trust and the
14 GUC Trust assets, and I think that's what's going to happen.
15 I'm just not there yet because I need my lead counsel's consent
16 and I need to hear from K and S as well as King and Spalding
17 and that's what tomorrow's noon conference is all about.

18 THE COURT: I lost you in the acronyms. I know who
19 King and Spalding is, who is --

20 MR. WEISFELNER: Oh, I'm sorry, it's K and E,
21 Kirkland and Ellis.

22 THE COURT: Okay. Kirkland I understand. Okay.

23 MR. WEISFELNER: So, Your Honor, again I think where
24 we are is the first deadline was that we were concerned about
25 was the deadline in front of Judge Furman on the motion to

1 withdraw the reference.

2 MR. MARTORANA: One here on the 20th.

3 MR. WEISFELNER: I'm sorry, the one that's due here
4 on the 20th which is their response on the merits to our GUC
5 Trust pleadings.

6 THE COURT: Which could be withdrawn but you got to
7 do some protective stuff.

8 MR. WEISFELNER: That's right. And I'm hoping to get
9 it withdrawn you know before close of business on Friday. The
10 next deadline to worry about is the deadline for responding to
11 our motion to withdraw the reference as it relates to the GUC
12 Trust pleading which is a deadline that's before Judge Furman.
13 Obviously if we withdraw that portion of the omnibus motion
14 that relates to the GUC Trust pleading then having withdrawn it
15 there is no predicate to another judge and that will become
16 moot. And our only purpose for again rising and informing Your
17 Honor that we may have pieces of paper in front of you or Judge
18 Furman or and/or Judge Furman is because you were anticipating
19 a slew of pleadings on the 20th, and in the absence of one of
20 those pleadings or getting an intervening message from us that
21 the motion has been amended since we were all here today we
22 wanted to take an opportunity to let you know what might be
23 coming down the pike. And instead of clarifying things and
24 making things easier we have obviously done just the opposite.
25 For that I apologize.

1 THE COURT: All right. But Mr. Martorana has a more
2 urgent need which is he's got a pleading due before me
3 tomorrow.

4 MR. MARTORANA: Not tomorrow, on the 20th.

5 THE COURT: Monday.

6 MR. MARTORANA: Monday, right. And for that, Your
7 Honor, there is a little bit of concern that I have because now
8 what I've heard is that they'll probably withdraw the
9 underlying pleading but they have to get consent from New GM
10 and they need to talk about it tomorrow at noon. I guess what
11 I would ask Your Honor is there any way that we can temporarily
12 --

13 THE COURT: Your time to respond --

14 MR. MARTORANA: Exactly.

15 THE COURT: And the tentative that I articulated to
16 all three of you, four if you count Ms. Newman, is that my
17 tentative is to give you the extra time to kind of toll it for
18 a while, but also insofar as stuff is before me to give Mr.
19 Steinberg that same right.

20 MR. WEISFELNER: Your Honor, I think what I'm hearing
21 is that the way to get everybody comfortable is to --

22 THE COURT: Come to a mike because this is --

23 MR. WEISFELNER: I apologize. Is for us to agree in
24 open Court that everyone's time to respond to our omnibus
25 motion is tolled through the 23rd. And if Your Honor is

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1 acceptable and can so order that, I think we're all comfortable
2 for today and we can move on and try and get this thing
3 resolved.

4 THE COURT: Mr. Steinberg, how does that sound to
5 you?

6 MR. STEINBERG: That's fine, Your Honor.

7 THE COURT: All right.

8 MR. MARTORANA: That's okay with us too, Your Honor.

9 THE COURT: Okay. So I'm so ordering the record and
10 the time for everybody, not just the GUC Trust is tolled under
11 the 23rd without prejudice to anybody's rights to come in for a
12 modification of that on or before that date. But with that
13 said, I would really like your guys in your meet and confer
14 tomorrow to see if you can put meat on the bones of that bare
15 bones tolling to see if there is a clear recommendation that is
16 agreed upon by all parties for the benefit of Judge Furman and
17 me as our interest may appear so to speak.

18 So talk about this in your meet and confer and see if
19 there's any stip or consent order that you can put forward to
20 which would presumably be partly before me, maybe a material
21 part before me, but which could also be something that will
22 need to be reviewed and approved by Judge Furman.

23 MR. WEISFELNER: Your Honor, at the risk of having my
24 head handed to me.

25 THE COURT: Yes, you are subjecting yourself to that

1 risk at this point.

2 MR. WEISFELNER: And, Your Honor, I'd like to think
3 it's, you know, for the benefit of all the parties here who are
4 worried about appeals, the timing of appeal, whether we're
5 going to the Second Circuit or Judge Furman, and I presume Your
6 Honor has seen Judge Furman's endorsed order.

7 The other issue that we're all struggling with is the
8 timing for resolution of outstanding motions to
9 reconsideration. Your Honor is aware that there is a motion
10 for reconsideration filed by Mr. Pillar and none of us are
11 aware of whether or when a hearing on those matters is likely
12 to occur.

13 THE COURT: There won't be a hearing, but when the
14 opinion, the rules of this Court, local rules of this Court
15 don't require hearings on motions for rearguments. When the
16 exact opinion will be done is something I can't give you as
17 much assurance on, although I can tell you with certainty that
18 you're not going to get it today. Okay? Anything else?
19 Anyone else want to have his or her head handed to him or her?
20 We're adjourned.

21 (Hearing Adjourned 11:53 AM)

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12 Hearing Re: Motion to Strike Certain Documents

13 Contained in Appellants' Designation of Items to

14 be Included in the Record on Appeal

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1 | CERTIFICATION

2 I, Theresa Pullan, certify that the foregoing is a
3 correct transcript from the official electronic sound recording
4 of the proceedings in the above-entitled matter.

5 Theresa Pullan

Digitally signed by Theresa Pullan
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